Insulflex Corp Sdn Bhd v Adwize Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-232–05 OF 2018
MOHAMED ZAINI MAZLAN J
6 MARCH 2019

Civil Procedure — Consent order — Application to set aside — Party not privy to consent order but affected by it applied to set aside consent order on ground its main consideration unlawful and against public policy — Whether applicant only aggrieved by one clause in consent order requiring certain police reports to be withdrawn — Whether clause merely ancillary and severable rendering rest of consent order enforceable — Whether it was unfair and unnecessary to set aside whole consent order just because of ancillary clause since the parties concerned already acted upon most of the terms of the consent order

The third defendant ('D3'), who was a director of a group of companies comprising the plaintiff, the first and second defendants ('D1' and 'D2') and two other companies, had petitioned to wind up D1 and D2 in which he was a shareholder. In the petitions, D3 had contended that his relationship with his other shareholders had irretrievably broken down resulting in a deadlock. The parties reached an amicable settlement and a consent judgment ('CJ') was recorded between D3 and D2 in which, inter alia, the procedures and timelines for D3 to sell off his shares in D1, D2 and another company in the group and to relinquish his roles in them were set out. Among other things, D3 was to resign as director of the group of companies, withdraw the two winding up petitions and do the necessary to transfer/assign certain registered trademarks to the plaintiff upon receipt of which the plaintiff was to withdraw a suit ('Suit 359') it had filed against D3. One clause in the CJ that became an issue was cl 8 which required another shareholder who had lodged police reports against D3 in connection with Suit 359 to withdraw those reports forthwith. The plaintiff, who was not party to the CJ but was affected by it, filed the instant originating summons ('OS') to declare void and to set aside the CJ on the ground that the main consideration for the CJ was the withdrawal of the police reports and that such a consideration rendered the CJ unlawful and against public policy and, therefore, void. D3, however, contended that the main purpose of the CJ was for him to end his relationship with the group of companies by selling off his shares in D1, D2 and another company and relinquishing his roles in them. D3 said cl 8 was merely an ancillary clause which could be severed from the rest of the CJ. D3 pointed out that since some of the terms of the CJ had already been acted upon, it was unfair to set aside the whole CJ just because of cl 8.

Held, declaring only cl 8 of the CJ to be null and void and dismissing the other prayers in the OS:

(1) An agreement that led to stifling a criminal investigation was void under the Contracts Act 1950 as it ran contrary to public policy. Clause 8 was such a clause (see paras 21 & 23).

(2) The court was of the view that cl 8 could be severed from the CJ. It was clearly independent from the other clauses and severing it from the rest would not impair the CJ or require it to be rewritten. Clause 8 was merely an ancillary clause and not the main consideration for the CJ. The terms of the CJ could still be performed without cl 8 as the main objective of the CJ was to end D3's participation in the companies concerned for a price to be determined. It was quite likely the parties would have entered into the CJ even if they could not agree to exclude cl 8. The court also took cognisance of the fact that the parties had already taken proactive steps to comply with most of the terms in the CJ. It was far too late in the day for the parties to resile from complying with the CJ, having benefitted from it partially (see paras 26–27 & 32–33).

[Bahasa Malaysia summary

Defendan ketiga ('D3'), yang merupakan pengarah kumpulan syarikat yang terdiri daripada plaintif, defendan pertama dan kedua ('D1' dan 'D2') dan dua syarikat lain, telah membuat petisyen untuk menggulung D1 dan D2 dalam yang mana dia adalah pemegang saham. Dalam petisyen tersebut, D3 menegaskan bahawa hubungannya dengan pemegang saham yang lain tidak dapat dikembalikan sehingga menyebabkan kebuntuan. Pihak-pihak mencapai penyelesaian yang baik dan penghakiman persetujuan ('PP') direkodkan antara D3 dan D2 di mana, antara lain, prosedur dan garis masa untuk D3 untuk menjual sahamnya dalam D1, D2 dan syarikat lain dalam kumpulan dan melepaskan peranannya di dalamnya telah ditetapkan. Antara perkara lain, D3 akan meletak jawatan sebagai pengarah kumpulan syarikat, menarik balik dua petisyen penggulungan dan melakukan perkara yang perlu untuk memindahkan/memberikan cap dagangan berdaftar tertentu kepada plaintif apabila diterima yang mana plaintif untuk menarik balik guaman ('Guaman 359') yang telah difailkan terhadap D3. Satu klausa dalam PP yang menjadi isu adalah klausa 8 yang memerlukan pemegang saham lain yang telah membuat laporan polis terhadap D3 berhubung dengan Guaman 359 untuk menarik balik laporan tersebut dengan serta-merta. Plaintif, yang mana adalah bukan pihak kepada PP tetapi dipengaruhi olehnya, memfailkan saman pemula ini ('SP') untuk mengisytiharkan tidak sah dan untuk mengetepikan PP atas alasan bahawa pertimbangan utama untuk PP adalah penarikan balik laporan polis dan bahawa pertimbangan menjadikan PP menyalahi undang-undang dan bertentangan dasar awam dan, oleh itu, tidak sah. Walau bagaimanapun, D3 menegaskan bahawa tujuan utama PP adalah untuk mengakhiri hubungannya dengan kumpulan syarikat dengan menjual

sahamnya dalam D1, D2 dan syarikat lain dan melepaskan peranannya di dalamnya. D3 berkata klausa 8 hanyalah klausa sampingan yang boleh dipisahkan dari seluruh PP. D3 menegaskan bahawa oleh kerana beberapa terma PP telah bertindak, adalah tidak adil untuk mengetepikan keseluruhan PP hanya kerana klausa 8.

Diputuskan, mengisytiharkan hanya klausa 8 PP batal dan tidak sah dan menolak permohonan lain dalam SP:

(1) Satu persetujuan yang menyebabkan sekatan penyiasatan jenayah adalah tidak sah di bawah Akta Kontrak 1950 kerana ia bertentangan dengan dasar awam. Klausa 8 adalah klausa sedemikian (lihat perenggan 21 & 23).

(2) Mahkamah berpendapat bahawa klausa 8 boleh diasingkan daripada PP. Ia jelas bebas daripada klausa lain dan memisahkannya dari yang lain tidak akan menjejaskan PP atau memerlukannya untuk ditulis semula. Klausa 8 hanyalah klausa sampingan dan bukannya pertimbangan utama untuk PP. Terma-terma PP masih boleh dilakukan tanpa klausa 8 kerana objektif utama PP adalah untuk mengakhiri penyertaan D3 dalam syarikat-syarikat yang berkenaan untuk harga yang ditentukan. Ia bermungkinan besar pihak-pihak akan memasuki PP walaupun mereka tidak boleh bersetuju untuk tidak memasukkan klausa 8. Mahkamah juga mengambil perhatian bahawa pihak-pihak telah mengambil langkah-langkah proaktif untuk mematuhi kebanyakan terma dalam PP. Sudah terlambat bagi pihak-pihak untuk menarik balik daripada mematuhi PP, setelah mendapat manfaat daripada sebahagiannya (lihat perenggan 26–27 & 32–33).]

Notes

For a case on application to set aside, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2380.

Cases referred to

CLAAS Medical Centre Pte Ltd v Ng Boon Ching [2010] 2 SLR 386, CA (refd)
Charles Ooi Kiah Inn & Anor v Kukuh Maju Industries Sdn Bhd [1993] 3 CLJ 199, SC (refd)
Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another [2013] 1 SLR 1, HC (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761, FC (refd)
Lau Chee Ching v Niah Native Logging Sdn Bhd [2002] 4 MLJ 8, CA (refd)
Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David [2008] 5 SLR 663, CA (refd)

Legislation referred to

Companies Act 1965 s 465(1)(h)
Contracts Act 1950
Penal Code s 182

RK Sharma (Amrit & Co) for the plaintiff.
Lavinia Kumaraendran (Jessica Leong Mei Ling with her) (Thomas Philip) for the third defendant.

Mohamed Zaini Mazlan J:

INTRODUCTION

[1] The plaintiff sought to declare the consent judgment entered between the second and third defendants in another suit be declared void and set aside, by virtue of one clause in the consent judgment, that it deemed to be against public policy.

[2] The main issue was whether the consent judgment should be set aside due to the sole clause complained of, or whether it could be severed, leaving the rest of the consent judgment intact.

BRIEF FACTS

[3] The third defendant is a shareholder in the first and second defendants. The third defendant had through two separate petitions filed in the High Court at Kuala Lumpur, sought to wind up the first defendant under Petition No 28NCC-198–04 of 2017, and the second defendant under Petition No 28NCC-199–04 of 2017. The third defendant premised his petitions under the just and equitable rule of s 465(1)(h) of the Companies Act 1965. Both petitions were before this court.

[4] The third defendant had in those petitions contended that the relationship between him and the other shareholders had irretrievably broken down, that resulted in a deadlock.

[5] The parties however reached an amicable settlement, that culminated into a consent judgment recorded on the 26 January 2018. The terms of the consent judgment were as follows:

CONSENT ORDER

UPON THIS MATTER being called today for hearing *AND UPON HEARING* Lavinia Kumaraendran (Jessica Leong with her), Counsel for the Petitioner and Datuk Wong Rhen Yen (Emily Wong, S Ravenesan, and Mohd Danial Hazizan

with him), Counsel for the Respondent *IT IS HEREBY ORDERED BY CONSENT* that:

1. A valuation of the Group of Companies (namely the Respondent, Adwize Sdn Bhd, Geovest Sdn Bhd, Insulflex Corporation Sdn Bhd and Insulflex Trading Sdn Bhd) be undertaken as at 7th April 2017 on a net tangible assets basis ('said Valuation') by either one of the following audit firms, jointly appointed and agreed by the parties hereto, to be completed within 60 days from the date of their appointment:

   1.1 PricewaterhouseCoopers;

   1.2 Deloitte;

   1.3 KPMG; or

   1.4 Ernst and Young.

   a) The costs of the said Valuation would be jointly borne by the Petitioner, Lee Chiah Cheang and Sin Kiong Fatt)

2. Sin Kiong Fatt and Lee Chiah Cheang and/or their nominated parties will purchase all the Petitioner's shares in Adwize Sdn Bhd, Ideal Standard Sdn Bhd and Insulflex Trading Sdn Bhd for 33.75% of the said Valuation and deduct the sum of RM1,294,852.90 (being the claim filed by Insulflex Corporation Sdn Bhd vide Kuala Lumpur High Court Civil Suit No WA-22NCC-359-09/2017 against the Petitioner ('Suit 359')). (the 'Purchase Price').

3. The Purchase Price is to be paid within 3 months from the date of receipt of the said Valuation, subject to an extension of one (1) month at an interest rate of 8% per annum.

4. The following documents listed below shall be forwarded by the Respondent's solicitors within 30 days from the date hereof and the executed documents shall be deposited with Messrs Thomas Philip as stakeholders:

   4.1. Share Transfer Forms in Ideal Standard Sdn Bhd, Adwize Sdn Bhd and Insulflex Trading Sdn Bhd;

   4.2. Original Share Certificate(s) in Ideal Standard Sdn Bhd, Adwize Sdn Bhd and Insulflex Trading Sdn Bhd;

   4.3. Resignation Letter of the Petitioner as director of the Group of Companies.

   4.4. Any other documents incidental and necessary.

   (hereinafter collectively referred to as the 'Security Documents')

5. Within seven (7) days from the receipt of the Purchase Price by Messrs Thomas Philip, Messrs Thomas Philip shall forward the Security Documents to the Respondent's solicitors;

6. That within fourteen (14) days from the date of this Order, the Petitioner shall upon receiving the audited accounts from the Respondents solicitors,

A sign and approve the audited accounts for the respective Group of Companies for the financial year ended 31.03.2017 and shall return the necessary signed copies to the Group of Companies for their lodgement with the Companies Commission of Malaysia;

B 7. The Petitioner will cause the duly executed documents for transfer or assignment of the registration of the trademarks (enclosed as Annexure A) to Insulflex Corporation Sdn Bhd within thirty (30) days from the date of the Order with the Respondent's solicitors to be released to Insulflex Corporation Sdn Bhd. The costs of this transfer will be borne by the Petitioner.

C 7.1. An undertaking by the Petitioner to refrain from registering and/or using any Trademark in relation to Insulflex Corporation Sdn Bhd and/or its products worldwide.

8. Sin Kiong Fatt will immediately withdraw all police reports lodged against the Petitioner in connection with Suit 359 and will deem that the matter D has been resolved between the parties.

8.1. Suit 359 shall be withdrawn upon receipt of the assignment of the trademark with no order as to costs and no liberty to file afresh.

E 9. The Petitioner will withdraw the present Petition and Kuala Lumpur Companies (Winding-Up) Petition No. WA-28NCC-198-04/2017 with no liberty to file afresh and no orders as to costs.

10. The Petitioner, Lee Chiah Cheang, Sin Kiong Fatt, and the companies in the Group of Companies shall have no further claims against each other F save for the enforcement of this Order.

11. Parties shall have liberty to apply.

Dated this 26th day of January, 2018

G **[6]** The plaintiff in contesting the consent judgment, sought for the following reliefs:

(a) that the consent order dated 26 January 2018 between the second and third defendant is declared null and void;

H (b) that in consequence to prayer (i), the consent order is set aside; and

(c) that the Kuala Lumpur High Court Companies (Winding-Up) Petition No 28NCC-198–04 of 2017 and Kuala Lumpur High Court Companies (Winding-Up) Petition No 28NCC-199–04 of 2017 be restored.

I **[7]** The plaintiff's main consternation was with cl 8 of the consent judgment, where it was agreed that Sin Kiong Fatt would withdraw all police reports lodged against the third defendant. Sin Kiong Fatt was the third defendant's fellow shareholder in the first and second defendants.

[8] The complaint lodged through the police report relates to a suit that had been commenced by the plaintiff against the third defendant, in Suit No WA-22NCC-359–09 of 2017, filed at the High Court at Kuala Lumpur. It was alleged in the police report that the third defendant had siphoned money from the plaintiff between March 2014 and February 2016. This suit had been withdrawn in accordance with the consent judgment.

GROUNDS FOR THE APPLICATION

[9] The plaintiff claimed that the main consideration for the consent judgment was the withdrawal of the police report, and that this was unlawful and against public policy. The plaintiff submitted that the consent judgment was therefore void, as the consideration for it was unlawful.

[10] The plaintiff contended that it had a responsibility to pursue the police report, as it pertained to an alleged crime committed by the third defendant against it.

[11] The plaintiff also submitted that it had every right to apply for the consent judgment to be set aside, even though it was not a party to the consent judgment. The plaintiff stated that it was affected by the consent judgment, as the police report lodged on its behalf was to be withdrawn.

[12] The plaintiff also claimed that the beneficial owners of the shares in the plaintiff and the second defendant are investors by the name of Ali Yunus, Yudi Prawira and Low Teck Huat. The plaintiff alleged that these investors were not aware of the consent judgment, and that their rights were affected by it.

THE THIRD DEFENDANT'S RESPONSE

[13] The third defendant contended that the withdrawal of the police report was not the main consideration for the consent judgment. The third defendant highlighted that cl 8 was merely an ancillary clause, as the essence of the consent judgment was the buying out of the third defendant's shares in the first and second defendant, and other related companies.

[14] Noting that the plaintiff's main issue was with cl 8, the third defendant submitted that cl 8 can be severed from the rest of the consent judgment. He does not seem to have any issue with this being done.

[15] The third defendant also pointed out that some of the terms in the consent judgment had already been complied with, particularly the ones that

A required the third defendant's action. He contended that it would be unfair to set aside the consent judgment, when the other parties had already benefitted from his actions.

FINDINGS

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[16] I would firstly disregard the plaintiff's claim that the beneficial owners of the shares in the plaintiff and the second defendant are investors by the name of Ali Yunus, Yudi Prawira and Low Teck Huat. I agree with the third defendant's contention, that this issue was never raised in the plaintiff's C affidavits, and nor was it stated as a ground in the originating summons. The plaintiff is therefore precluded from now raising it.

[17] I now come to cl 8 of the consent judgment where Sin Kiong Fatt was D to withdraw all police reports lodged against the third defendant in connection with Suit No WA-22NCC-359–09 of 2017 filed in the High Court at Kuala Lumpur.

[18] A police report sets out the complaint by the accuser against the E accused. The complaint may pertain to a matter that is criminal in nature or civil, but it is just that, a report containing allegations.

[19] A police report does not make the matter alleged conclusive. It is merely an allegation which obliges the police to investigate. It is then for the public F prosecutor to decide whether any further action is to be taken. A police report cannot be taken to conclude that the accused has committed a crime.

[20] Lodging a police report with the knowledge or belief that the report is G false, with the intention for the police to act on it however is a crime. This is provided under s 182 of the Penal Code. Once a police report is lodged, it is the prerogative of the authorities whether to take any further action. A police report cannot be withdrawn. The complainant can merely request that no further action be taken in respect of the report, but the prerogative remains H with the authorities.

[21] That the stifling of prosecution as the main consideration for an agreement is deemed void under the Contracts Act 1950 is settled law. The Supreme Court in *Charles Ooi Kiah Inn & Anor v Kukuh Maju Industries Sdn* I *Bhd* [1993] 3 CLJ 199 (SC) held:

> Such a contract to stifle prosecution was unlawful because the charges agreed to be withdrawn related to cheating which being a non-compoundable offence with the Court having no discretion to compound the same, the consideration or object was against public policy and was caught by the second limb of s 24(e) of the Act.

[22] A consent judgment, similar to any agreement, is liable to be set aside on the same grounds that an agreement can be set aside such as illegality; *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 (FC).

[23] I am constrained to follow settled authorities, that an agreement that leads to stifling a criminal investigation is void, as it runs contrary to public policy. In my view, cl 8 is such a clause.

[24] The central issue is whether the consent judgment here should be set aside due to cl 8, or whether it can merely be severed.

[25] I agree with the third defendant's contention that cl 8 was not the main consideration for the consent judgment. It was merely an ancillary clause. It is clear that the main objective of the consent judgment was to end the third defendant's relationship with his adversaries, by selling of his shares in the companies concerned, and relinquishing his roles in them. It was plainly a commercial agreement.

[26] It is quite likely that parties would still enter into the consent judgment, even if they could not agree to exclude cl 8. The objective of the consent judgment could still be met without cl 8.

[27] I also took cognisance of the fact that the parties have already taken proactive steps to comply with most of the terms in the consent judgment. It is far too late in the day for parties to now resile from complying with the consent judgment, having benefitted partially.

[28] The Court of Appeal in *Lau Chee Ching v Niah Native Logging Sdn Bhd* [2002] 4 MLJ 8 (CA), held that whether a clause could be severed would depend on the facts and circumstances of each case. The pertinent passage is as follows:

> Mr Chong, learned counsel for the plaintiff, submitted that cl 3(a) which was on withdrawal of the Police report was independent of the rest of the deed. He contended that cl 3(a) is severable.
>
> Having regard to the words 'any of the instalments' as stated in cl 4(a) of the deed, it seems to suggest that the plaintiff is entitled to enforce the deed and to insist on full payment of RM2,585.828.01 less the amount paid, in the event that the defendant defaulted payment of any of the instalments. In construing the words 'any of the instalments' in cl 4(a), it appears that cl 4(a) also applies to cl 3(a) which is the illegal part of the deed. *On the question of whether cl 3(a) is severable, it would depend on the facts and circumstances of each case*. In this regard, it is pertinent to refer to Pollock & Muller on *Indian Contract and Specific Relief Acts* (10th Ed) at p 289 which states:
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> > A promise made for an unlawful consideration cannot be enforced, and there is

A not any promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole. *On the other hand, it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a district consideration* B *which is wholly lawful can be found for the promise called in question. The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void*; ... (Emphasis added.)

C **[29]** Across our causeway, the Singapore High Court in *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 SLR 1, dealt with an offending clause in the rental agreement between the plaintiff and defendant. The clause concerned was an indemnity clause, where it stated that the plaintiff would need to indemnity the defendant against loss, actions, claims, demands and proceedings whether criminal or civil. D

[30] The court in holding that it was against public policy for one to indemnify another against the consequences of a crime, had to consider whether the whole clause became void, as it was perfectly permissible for a E party to indemnify the other party for civil claims.

[31] The court considered the cases of *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 5 SLR 663 and *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] F 2 SLR 386, where the underlying considerations were that the offending clause could only be severed, if it does not render the agreement senseless, and without the court having to rewrite it. The court there came to the conclusion that the offending part of the clause, 'whether criminal or civil', could be severed without altering the remaining indemnity clause, or rendering it G grammatically senseless.

[32] I am of the view that cl 8 can be severed from the consent judgment. It is clearly a clause that is independent from the other clauses in the consent H judgment. Severing cl 8 will not impair the consent judgment and nor would it have to be rewritten.

[33] Clause 8 was merely an ancillary clause, and not the main consideration for the consent judgment. The terms of the consent judgment could still be I performed without the existence of cl 8, as the main objective of the consent judgment was to end the third defendant's participation in the companies concerned for a price to be determined.

CONCLUSION

[34] The plaintiff's prayer under para 1 of the originating summons for a declaration that the consent judgment dated 28 January 2018 is null and void, is only allowed in respect of para 8, which reads 'Sin Kiong Fatt will immediately withdraw all police reports lodged against the Petitioner in connection with Suit 359 and will deem that the matter has been resolved between the parties', excluding para 8.1. Prayers 2 and 3 of the originating summons are dismissed.

[35] The plaintiff is ordered to pay the third defendant costs of RM10,000.

Only cl 8 of the CJ declared to be null and void and other prayers in the OS dismissed.

Reported by Ashok Kumar